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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 377

ASA H. WHITFIELD,

Petitioner,

vs.

THE STATE OF OHIO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

SUPPLEMENTAL BRIEF FOR THE PETITIONER.

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The Federal Question under the Fourteenth Amendment that the Privileges or Immunities of the Petitioner Had Been Abridged by the Law of Ohio was Properly Raised.

Upon the argument of the above case on February 7 doubt was expressed that the petitioner had raised in the court below the question that the law of the State of Ohio under which he was convicted had abridged the privileges and immunities to which he was entitled as a citizen of

the United States. An examination of the record shows that the warrant under which the petitioner was arrested was issued on October 2 (R. 2-3); that he was tried on October 3 (R. 7) and that upon the examination of the petitioner as a witness in his own behalf the following questions were asked and answered as indicated:

"Q. And your defense is that the law, as passed, is unconstitutional under the Federal Constitution?

"A. Yes.

"Q. That it violates the Federal Constitution?

"A. Yes."

After the defendant was convicted he filed his petition-in-error in the Court of Appeals (R. 14), the seventh paragraph of which (R. 15) is to the effect that the verdict was "contrary to the Constitution of the United States of America."

While in his motion in the Municipal Court in arrest of judgment he sets out specifically that he was denied due process of law to which he was entitled under the Fourteenth Amendment, the Court of Appeals nevertheless, evidently considered that the question of the abridgment of the privileges or immunities of the petitioner had been properly raised and in its opinion discussed this question (*Whitfield* v. *State*, 197 N. E. 605, 606 (1935)), saying:

> "It is urged that section 2228-1, General Code, when it provides that 'goods, wares or merchandise, manufactured or mined wholly or in part in any other State by convicts or prisoners,' shall be excluded from the open market in the State of Ohio, abridges the privileges and immunities of citizens of the United States, in that it deprives a citizen of the United States, who has merchandise made by convicts of another State, from competing with convict-made goods in the State of Ohio. p. 606.
>
> * * * * * * * *

> "The laws of Ohio prohibit the manufacture of convict-made goods in Ohio, except for use in correctional institutions, and thereby preclude their sale in the open market. The argument of plaintiff in error, to the effect that section 2228-1 of the General Code deprives citizens of the United States who have merchandise made by convicts of other States from competing with convict-made goods in the State of Ohio, appears to us without force, since the use to be made of convict-made goods in Ohio is limited to correctional and other public institutions." p. 607.

Section 237 of the Judicial Code (28 U. S. C. A., § 344) provides in paragraph (b) for the jurisdiction of this Court by the issuance of a writ of certiorari

> "where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States; • • •"

In *The Bridge Proprietors* v. *The Hoboken Company*, 68 U. S. 116 (1863), the question arose whether under the twenty-fifth section of the act of Congress of 1789 (1 Stat. at L. 73, 85) providing that

> "where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States • • •",

it was necessary for the petitioner-in-error to have set out the special clause of the Constitution supposed to render

the Act invalid. The Court declared that this was not so necessary, saying:

> "It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: 'This paragraph of the Constitution is the one involved in this case.'" P. 142.

The Court stated in *The Victory,* 73 U. S. 382 (1867), that the point to be raised

> "need not appear by express averment, but if the record shows by necessary intendment that the point was decided, it is sufficient, * * *" P. 384.

In *Murray* v. *Charleston,* 96 U. S. 432 (1887), the Court said:

> "* * * The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of State legislation, this court is authorized to interfere. The form and mode in which the Federal question is raised in the State court is of minor importance, if, in fact, it was raised and decided. The act of Congress of 1867 gives jurisdiction to this court over final judgments in the highest courts of a State in suits 'where

> is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.' Not a word is said respecting the mode in which it shall be made to appear that such a question was presented for decision. In the present case, it was necessarily involved, without any formal reference to any clause in the Constitution, and it is difficult to see how any such reference could have been made to appear expressly." P. 441.

In *Spencer* v. *Merchant,* 125 U. S. 345 (1887), the question was the validity of an assessment. The owner contended that the assessment was unconstitutional and void because it was an attempt by the legislature to validate a void assessment without giving the owner of the lands assessed an opportunity to be heard upon the whole amount of the assessment. The Court said that the owner

> "thus directly, and in apt words, presented the question whether he had been unconstitutionally deprived of his property without due process of law, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, as well as of art. 1, sec. 7, of the Constitution of New York; and no specific mention of either constitutional provision was necessary in order to entitle him to a decision of the question by any court having jurisdiction to determine it. * * *" P. 352.

Wabash Railroad Company v. *Pearce,* 192 U. S. 179 (1903), involved a shipment of curios originating in Japan which was delivered to the ultimate carrier, the defendant railroad company, the company being responsible under traffic agreements for the payment of duties amounting to $264 upon the entrance of the shipment into the United

States. The plaintiff, Pearce, brought an action in replevin and the railroad answered that it was

> " 'entitled to the first lien on said goods under the laws of the United States for the amount of said duties.' * * *" P. 185.

The Court said that although no single statute was mentioned, the railroad

> "claimed a lien on the goods under and by virtue of the laws of the United States, and thus directly called for a determination of a Federal right. * * *" P. 185.

The Railroad Company contended that the payment of the duties exacted under the statutes of the United States operated not only to release the goods but to give the carrier the right and privilege of maintaining possession until reimbursed these duties.

> "* * * This right and privilege [of possession] was specially set up and claimed by the railroad company. Whether it existed was the substantial question presented and decided. And whether rightly or wrongly decided the presentation of the question, the claim of the right and privilege was, when denied by the state court, sufficient to give this court jurisdiction." Pp. 185-186.

In *Mallinckrodt Works* v. *St. Louis*, 238 U. S. 41 (1915), the defendant-in-error filed a motion to dismiss the appeal on the ground that the Federal questions set up in the Supreme Court were not raised in the trial court or in the Supreme Court of the State with sufficient definiteness to comply with section 237 of the Judicial Code. The manner in which the questions were raised in the court below appears in 249 Mo. 702, Grounds (8) and (9), as set out on p. 708. Ground (8) set out that the refusal of the court

below to grant the peremptory instruction for the plaintiff-in-error denied to it and its officers

> "the equal protection of the laws guaranteed to them by the 14th Amendment to the Federal Constitution, and denied to defendant and its officers their rights and immunities thereby secured, * * *" p. 708.

Ground (9) was based on the alleged error of the court in not finding for the plaintiff-in-error because as to the affidavit required of defendant's officers

> "the immunity is not complete and not commensurate with the constitutional guaranty to the officers of the defendant against the giving of a self-incriminating affidavit * * *" p. 708.

The Supreme Court of Missouri, in discussing ground (8) set out that the contention of the plaintiff-in-error was that the challenged section (10322) violated the Fourteenth Amendment of the Constitution

> "in that it denies to the appellant and its officers the equal protection of the laws by requiring them to make the affidavit mentioned therein, and at the same time exempting therefrom all 'partnerships, individuals or association of individuals who may be engaged in the same character of business.'" P. 733.

The court referring to a prior case which it had decided likened the position of the plaintiff-in-error to the corporation in such prior case whose position was that the challenged sections were

> "'* * * in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, in that while they denounce the same acts, whether committed by individuals or individuals and corporations, they impose upon the latter a greater and different punishment from that imposed upon individuals.'" P. 733.

The Missouri court proceeded to quote from such prior case, setting out the distinction between individuals and corporations and stated that such case decided against the contention of the plaintiff-in-error the question of equal protection of the laws. It appears that while the plaintiff-in-error in ground (8) raised the question of the denial of equal protection and of rights and immunities, the matter of due process was not referred to until the case reached the Supreme Court of the United States. There, upon a motion to dismiss, that court said that it appeared from the opinion of the court below that the question of equal protection had been sufficiently treated and that this conferred jurisdiction upon the Supreme Court and that the motion to dismiss must be denied. On page 52 of the opinion the Supreme Court said that assuming, without deciding, that all the grounds upon which the validity of the challenged section were attacked in the Supreme Court were properly raised in the State court, the Supreme Court would discuss them, and thereupon proceeded to announce that the plaintiff-in-error had not been denied due process (pp. 52-5).

In the case at bar the petitioner filed demurrers to the warrant (R. 3) on the ground that the warrant did not charge an offense "all as set out in the brief hereto attached". The attached brief is not made a part of the record. It is referred to again at the top of page 5 and made a part of the motion for a new trial.

In the petition-in-error in the Court of Appeals (R. 14) grounds are set out to the effect, among others, that the municipal court erred in overruling the motion of the plaintiff-in-error to direct a verdict at the close of the testimony in the case and for the further reason that the verdict was contrary to the Constitution of the United States. An examination of the testimony, a consideration of the several provisions of the Constitution which may be invoked, to-

gether with an examination of the lengthy opinion of the Court on the question of abridgment of the petitioner's privileges and immunities, would indicate that this question had been sufficient ly raised either in the briefs accompanying the demurrers, in the oral argument, or elsewhere, so as to require the Court of Appeals of Ohio to decide the question.

Under Section 1483 of the Code of Ohio (1934) the opinion of the Court of Appeals in this case, having been published in 49 Ohio App. 530 (197 N. E. 605), it "shall be recognized by and receive the official sanction of any court within the state". While the opinion is not contained in the record, a certified copy has been lodged in the clerk's office. For convenience, it has been inserted in the brief of the petitioner for writ of certiorari (pp. 26-36).

By the settled course of the decisions of this Court under the existing Judiciary Acts of the United States, this Court may examine opinions so delivered and recorded to ascertain the ground of the judgment of the state court.

Kreiger v. *Shelby Railroad Company,* 125 U. S. 39, 44 (1888);

Murdock v. *Memphis,* 87 U. S. (20 Wall.) 590, 633 (1874);

McManus v. *O'Sullivan,* 91 U. S. 578, 579 (1875);

Philadelphia Fire Association v. *New York,* 119 U. S. 110 (1886).

In *Jones National Bank* v. *Yates,* 240 U. S. 541 (1915) the plaintiffs, who were unpaid depositors, while invoking no Federal statute by name in their suit to recover damages from the directors of the bank which had suspended payment, set out facts which clearly brought the action under the National Bank Act. It was insisted in the Supreme Court that the writ should be dismissed in the view that the plaintiffs-in-error (the depositors) sought to enforce liability upon non-Federal grounds and that the Federal question

was raised exclusively by the defendants-in-error. The Court said that

> "* * * The fact that their petitions did not refer, in terms, to the Federal statute is not controlling. * * *" P. 550.

The Court set out that the facts averred by the plaintiffs were transactions falling within the purview of the National Bank Act and that the plaintiffs' rights must be measured accordingly, that

> "* * * If the plaintiffs' cause of action required the application of the Federal statute in defining the liability of these directors with respect to the acts alleged and proved, the plaintiffs were entitled to its correct application. Their case, as made by their pleadings and proofs, is not to be treated as of one character for the purpose of dismissing it in the state court and as of another sort for the purpose of denying their right to complain of the dismissal. We conclude that this court has jurisdiction." P. 551.

In view of the foregoing authorities, of the clear statement by the Court of Appeals of Ohio to the effect that the privileges and immunities of the petitioner had not been denied, the petitioner contends that this question is properly raised.

Respectfully submitted,

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